

SEP 18 1978

MICHAEL RODAK, JR., CLERK

In the  
Supreme Court of the United States

No.

78-456

STATEWIDE CONTRACTORS, INC., and  
NATHAN H. KELLY,

*Petitioners,*

vs.

FOWLER, WHITE, GILLEN, BOGGS,  
VILLA-REAL & BANKER, P.A., a Professional  
Association, and JERRY B. LANDIS,

*Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES SUPREME COURT FROM THE FINAL  
DECISION OF THE PENNSYLVANIA SUPREME COURT  
AT ALLOCATOR DOCKET No. 1553

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## INDEX TO PETITION

	<u>Page</u>
OPINIONS BELOW.....	1
JURISDICTION .....	1
QUESTIONS PRESENTED .....	2
STATUTES .....	3
STATEMENT OF THE CASE .....	3
REASONS FOR GRANTING A WRIT	
OF CERTIORARI .....	5
CONCLUSION .....	9
APPENDIX.....	12
PROOF OF SERVICE.....	18a

## TABLE OF CITATIONS

### CASES

<i>Bork v. Mills</i> , 468 Pa. 228, 329 A.2d 247 (1974).....	8
<i>International Shoe Co. v. State of Washington</i> , 326 U.S. 310 (1945) .....	6,7,8
<i>Perkins v. Benquet Consolidated Mining Co.</i> , 342 U.S. 437 (1952) .....	8
<i>Procter Schwartz, Inc. v. Cleveland Lumber Co.</i> , 228 Pa. Super. 12, 323 A.2d 11 (1974) .....	6
<i>Shaffer v. Heitner</i> , 97 S.Ct. 2569 (1977) .....	6

### STATUTES

Act of 1972, November 15, P.L. 1063, 42 Pa. C.S.A. §8301 <i>et seq</i> .....	1,3,5
---	-------

### MISCELLANEOUS

Restatement of Conflicts 2d, §35 .....	8
--	---

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Petitioners pray that a Writ of Certiorari be issued to review the final judgment of the Pennsylvania Supreme Court entered in the above-captioned case on August 3, 1978.

Citations to Opinions Below and  
Grounds for Jurisdiction

1

**CITATIONS TO OPINIONS BELOW**

The opinion of the Court of Common Pleas of Allegheny County, Pennsylvania, denying your Petitioner's Preliminary Objections to the exercise of *in personam* jurisdiction is reprinted in Appendix "A". The text of the Order of the Pennsylvania Superior Court on appeal from the decision of the Order of the Court of Common Pleas is reprinted in Appendix "B". The Order of the Pennsylvania Supreme Court denying the Petitioners' Petition for Allowance of Appeal is set out at Appendix "C". The above-mentioned Opinion and Orders are unprinted.

**GROUND FOR JURISDICTION**

The Order of the Supreme Court of Pennsylvania denying the Petition for Allowance of Appeal was entered on August 3, 1978. The jurisdiction of this Honorable Court is invoked under Section 1257 (3) of Title 28 of the United States Code, 28 U.S.C.A. §1257 (3) in that the validity of the exercise of *in personam* jurisdiction under the Pennsylvania Long Arm Statute over your Petitioners is repugnant to the Constitution of the United States.

**QUESTIONS PRESENTED FOR REVIEW**

I. DOES THE EXERCISE OF *IN PERSONAM* JURISDICTION BY THE COMMONWEALTH OF PENNSYLVANIA UNDER A "LONG ARM STATUTE" OVER A NON-RESIDENT INDIVIDUAL, WHERE THAT INDIVIDUAL IS NOT "DOING BUSINESS" WITHIN THE COMMONWEALTH AT THE TIME THE ALLEGED CAUSE OF ACTION AROSE, OFFEND TRADITIONAL NOTIONS OF "FAIR PLAY AND SUBSTANTIAL JUSTICE" AND THEREBY IMPINGE UPON THAT INDIVIDUAL'S RIGHT TO DUE PROCESS OF LAW UNDER THE 14TH AMENDMENT OF THE CONSTITUTION?

*The Courts below answered "No".*

II. DOES A FOREIGN CORPORATION, WHICH HAD BEEN "DOING BUSINESS" IN THE COMMONWEALTH OF PENNSYLVANIA BY VIRTUE OF A FRANCHISE AGREEMENT WITH A PENNSYLVANIA CORPORATION, SUBJECT ITSELF TO THE EXERCISE OF *IN PERSONAM* JURISDICTION CONSISTENT WITH THE DICTATES OF DUE PROCESS OF THE 14TH AMENDMENT OF THE CONSTITUTION UPON A CAUSE OF ACTION ARISING OUT OF THE ALLEGED BREACH OF AN AGREEMENT TO REPRESENT THE FOREIGN CORPORATION IN A FLORIDA ANTITRUST LITIGATION AND OCCURRING AFTER THE FOREIGN CORPORATION HAD CEASED DOING BUSINESS IN PENNSYLVANIA?

*The Courts below answered "Yes".*

**STATUTES**

The applicable statutory provision is the Pennsylvania "Long Arm Statute" Act of 1972, November 15, P.L. 1063, 42 Pa. C.S.A. §8301, *et seq.*, and the pertinent sections are reproduced in Appendix "D".

**STATEMENT OF THE CASE**

A cause of action in *assumpsit* was filed in the Court of Common Pleas of Allegheny County, Pennsylvania, by Fowler, White, Gillen, Boggs, Villa-real and Bunker, P.A. (Fowler, White), a Florida professional association, and Jerry B. Landis, Esquire (Landis), a resident of Pennsylvania. The defendants, Statewide Contractors, Inc. (Statewide) and Nathan H. Kelly (Kelly), are a Florida corporation and Florida resident, respectively. All of the parties to this action with the exception of Landis, are Florida domiciliaries and subject to its jurisdiction.

The Complaint of Fowler, White and Landis alleges, *inter alia*, that on or about December, 1972, in Allegheny County, Pennsylvania, Fowler, White and Landis entered into an oral agreement with Statewide and Epic Metals Corporation (a Pennsylvania corporation) whereby Fowler, White and Landis agreed to represent Statewide and Epic in a cause of action filed in their behalf in the United States District for the Middle District of Florida. Kelly was made a party defendant on the theory that he used Statewide as his alter ego.

Fowler, White and Landis alleged that Statewide breached the aforementioned oral agreement on September 12, 1974, when Statewide failed to pay for legal services which were billed to it by Fowler, White.

Prior to the alleged breach, the only contact that Statewide had with the Commonwealth of Pennsylvania

was a result of Statewide's dealings with Epic. Beginning in 1971, Statewide acted as a Florida distributor of a product manufactured by Epic called epicore. Epicore was shipped from Allegheny County to Statewide, F.O.B. Allegheny County, from 1971 until June of 1974. From June, 1974, to the present, epicore is manufactured and shipped from Lakeland, Florida.

In November, 1972, in anticipation of an antitrust suit to be filed by Statewide and Epic, Kelly, in his capacity as President of Statewide, met with Ronald McCall, Esquire in the Florida offices of Fowler, White. Despite the allegations in the Complaint, at the November, 1972 meeting, only Fowler, White was retained by Statewide to represent Statewide's interests in the antitrust litigation. Furthermore, all deposed parties agreed that the attorney-client relationship between Fowler, White and Statewide arose at the November, 1972 meeting in Fowler, White's offices in Florida.

On December 5, 1972, a meeting in Greater Pittsburgh International Airport was arranged so that the statement of Mr. Van Siklin could be taken in connection with the antitrust suit in Florida. Arrangements for this meeting were made prior to December 5, 1972, during the course of Fowler, White's representation of Statewide. It is at this meeting that Fowler, White and Landis alleged that Statewide retained their services and upon which the requisite "minimum contracts" are founded.

The bill for legal services rendered by Fowler, White to Statewide as made by Fowler, White on its letterhead and directed to Statewide. Partial payments made by Statewide were made by checks drawn on Statewide's account and paid directly to Fowler, White. At no time did Statewide pay Landis directly for legal services. All billings, all payments, and the actual litigation took place in the State of Florida.

Both Statewide and Kelly filed Preliminary Objections to the Complaint raising questions of jurisdiction, service of process of venue, and more specific pleadings. The Lower Court, in response to the Preliminary Objections, held that the Court did not lack jurisdiction as to either Statewide or Kelly, and therefore, overruled the objection of jurisdiction, service of process and venue. However, the Preliminary Objections in reference to a more specific pleading were sustained.

A timely appeal to the Superior Court from the decision of the Common Pleas Court was taken by both Kelly and Statewide on April 12, 1977. On February 15, 1978, the Superior Court affirmed the decision of the Lower Court in a Per Curiam decision.

Thereafter, Statewide and Kelly filed a Petition for Allowance of Appeal from the Superior Court to the Pennsylvania Supreme Court on March 16, 1978. On August 3, 1978, the Pennsylvania Supreme Court denied the Petition for Allowance of Appeal in a Per Curiam decision.

Hence this Petition for a Writ of Certiorari.

#### **REASONS FOR GRANTING A WRIT OF CERTIORARI**

- I. THE EXERCISE OF *IN PERSONAM* JURISDICTION BY THE COMMONWEALTH OF PENNSYLVANIA OVER A NON-RESIDENT INDIVIDUAL UNDER THE CIRCUMSTANCES OF THE INSTANT CASE OFFENDS TRADITIONAL NOTIONS OF "FAIR PLAY AND SUBSTANTIAL JUSTICE", AND IS THEREFORE A DENIAL OF DUE PROCESS UNDER THE 14TH AMENDMENT OF THE CONSTITUTION.

Regardless of the statutory language employed in the Pennsylvania "Long Arm Statute", the Courts of Penn-

sylvania are confined in the exercise of *in personam* jurisdiction by the dictates of *International Shoe Company vs. Washington*, 326 U.S. 310 (1945) and its progeny. In *International Shoe*, this Honorable Court set out the applicable test for determining the appropriateness of exercising *in personam* jurisdiction as follows:

"Due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'. *Milliken vs. Meyer*, 311 U.S. 457, 463, 61 S. Ct. 339, 343, 85 L. Ed. 278." 326 U.S., at 316.

This statement of general constitutional principle has been followed by the Pennsylvania Courts, most notably in the decision of *Procter Schwartz, Inc. vs. Cleveland Lumber Company*, 228 Pa. Super. 12, 323 A.2d 11 (1974).

However, from *International Shoe* to this Court's decision in *Shaffer vs. Heitner*, 97 S. Ct. 2569 (1977), minimum contacts has come to mean more than merely some nebulous presence within the forum. As noted in *Shaffer*, "the relationship among the defendant, forum and the litigation, . . . became the central concern of the inquiry to personal jurisdiction." 97 S. Ct., at 2580.

It is the Petitioner's contention that the present exercise of *in personam* jurisdiction is inconsistent with the Due Process Clause of the 14th Amendment of the Constitution. It seems patently unreasonable and unfair to require a Florida resident and/or a Florida corporation to defend a suit for the alleged breach of an employment contract, arising out of a law suit instituted in the State of Florida and filed by a Florida professional association, in the State of Pennsylvania. The Corporate Petitioner's contacts with the forum state are at best minuscule inasmuch as they are only

indirectly related to the cause of action of Fowler, White and Landis.

The individual Petitioner's contacts with the forum state are non-existent. Any acts by Kelly in the forum state were acts as President of Statewide. The only minimum contacts which form a basis for the exercise of jurisdiction over the non-resident individual Petitioner are the bare allegations in the Complaint filed below that the individual Petitioner used the corporate Petitioner as his alter ego. Certainly, fair play and substantial justice requires more than mere allegations that the "corporate veil" should be pierced because of vague allegations of "alter ego."

Under these circumstances, it cannot be said that traditional notions of fair play and substantial justice are served by the exercise of *in personam* jurisdiction. Your Petitioners, therefore, submit that the exercise of jurisdiction in this case fails to comport with the decision rendered by this Court.

## II. A FOREIGN CORPORATION WHICH HAS CEASED DOING BUSINESS IN PENNSYLVANIA WHEN THE ALLEGED CAUSE OF ACTION AROSE AND WHERE THAT BUSINESS IT HAD CONDUCTED IS ONLY INDIRECTLY RELATED TO THE CAUSE OF ACTION, CANNOT BE CONSTITUTIONALLY COMPELLED TO DEFEND AGAINST THAT CAUSE OF ACTION IN THE COMMONWEALTH OF PENNSYLVANIA UNDER THE 14TH AMENDMENT.

The "minimum contacts" test enunciated in *International Shoe* applies to foreign corporations as well as to nonresident individuals. Likewise, the determination of whether the requisite minimum contact is present so that the exercise of *in personam* jurisdiction does not offend

"traditional notions of fair play and substantial justice" requires something more than a compilation of activities which had taken place within the forum. As noted in *International Shoe*:

"Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties or relations." 362 U.S. at 319.

Moreover, the language of *International Shoe* concerning the quality of the contacts between the forum and the foreign corporation indicates that the "minimum contacts" approach may be inadequate where the cause of action does not arise from the business conducted within the state. This line of reasoning suggested by *International Shoe* is contained in the decision of *Perkins v. Benquet Consolidated Mining Co.*, 342 U.S. 437 (1952). Furthermore, this more than minimum contacts requirement is set out at Section 35(3) of the Restatement of Conflicts 2d wherein it is stated:

"A state has power to exercise judicial jurisdiction over an individual who does business in the state with respect to causes of action that do not arise from the business done in the state if this business is so continuous and substantial as to make it reasonable for the state to exercise such jurisdiction."

This substantial relationship approach has been adopted by the Pennsylvania Supreme Court in the case of *Bork v. Mills*, 468 Pa. 228, 329 A.2d 247 (1974).

Your Petitioner respectfully submits that the facts do not indicate that there existed a continuous and substantial relationship between Statewide and the Commonwealth of

Pennsylvania. Therefore, there are no constitutionally permissible grounds upon which the exercise of a *personam* jurisdiction can be based.

## CONCLUSION

It is respectfully submitted that a Writ of Certiorari should be granted on the basis of the issues raised in this Petition. It is readily apparent, in light of the facts in this case, that the requisite minimum contacts are not present, and that the Courts of Pennsylvania do not have *in personam* jurisdiction over the non-resident and/or the foreign corporation.

Respectfully submitted,

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**INDEX TO APPENDIX**

Decision of the Court of Common Pleas of  
Allegheny County ..... Appendix "A"  
Order of the Superior Court ..... Appendix "B"  
Order of the Supreme Court ..... Appendix "C"  
Statutory Provisions ..... Appendix "D"

**IN THE  
COURT OF COMMON PLEAS OF  
ALLEGHENY COUNTY, PENNSYLVANIA  
CIVIL DIVISION**

FOWLER, WHITE, GILLIAN,  
BOGGS, WILLAREAL & BANKER,  
P.A., a professional association  
and JERRY B. LANDIS

} No. GD 76-17456

vs

STATEWIDE CONTRACTORS,  
INC., and NATHAN H. KELLY

**OPINION**

(Filed April 21, 1977.)

BARRY, J

April 21, 1977

This case comes before the court on defendants' preliminary objections raising the questions of lack of jurisdiction, improper service of process, improper venue and asking for a more specific pleading.

Plaintiff, Fowler-White is a law firm with offices located in Tampa, Florida. Plaintiff, Jerry Landis is an attorney with offices in Allegheny County, Pennsylvania. Defendant, Statewide Contractors, Inc. is a Florida corporation having its principal office in Miami, Florida. The individual defendant, Nathan H. Kelly, also a Florida resident, serves as President of Statewide Contractors, Inc.

Plaintiffs filed a complaint in assumpsit alleging that on December 5, 1972, the plaintiffs and defendants met at the Greater Pittsburgh International Airport and reached an agreement whereby the plaintiffs would represent the

defendants in an anti-trust suit in Florida against a third party. Plaintiffs further allege that the individual defendant, Nathan H. Kelly, has at all times pertinent hereto used the corporate defendant, Statewide Contractors, Inc., as his alter ego. Both defendants, plaintiffs allege, have breached the alleged fee agreement, thereby giving rise to this lawsuit.

The primary issue presented to the court is one of jurisdiction, there are sufficient minimum contacts between the non-resident defendants and the Commonwealth to confer jurisdiction on the court consistent with the requirements of due process?

#### I. THE CORPORATE DEFENDANT.

In *Procter-Schwartz v. Cleveland Lumber Co.*, 228 Pa. Super. 12, 323 A. 2d 11 (1974), the Superior Court was called upon to construe the provisions of the Pennsylvania Long Arm Statute, (42 P.S.C.A. §8302, et seq.) The underlying policy of the statute, the court found, was to extend in personam jurisdiction to the full measure consistent with due process standards. While recognizing that the ultimate determination of the existence of sufficient minimum contacts must be made on an ad hoc basis, the court promulgated a three-fold test applicable to non-resident corporations to "aid in the factual analysis necessary to make the determination of whether the requisite minimum contacts are present in a given case." The requirements set forth by the court are:

- (1) The defendant corporation must have purposefully availed itself of the privilege of acting within the Commonwealth of Pennsylvania thus invoking the benefits and protections of its laws;
- (2) the cause of action must arise from the defendant's activities within the Commonwealth;

- (3) the acts of defendant corporation must have a substantial enough connection with the Commonwealth of Pennsylvania to make the exercise of jurisdiction over it reasonable.

Applying the above test, the court held that Pennsylvania courts had jurisdiction over a Georgia corporation whose sole contact with the Commonwealth was a contract executed with a Pennsylvania corporation which, by its terms, was to be governed by Pennsylvania law, and which the defendant had actively negotiated with the Plaintiff. The court found that the foreign corporation could have reasonably anticipated that the contract would have a substantial economic impact within Pennsylvania, and it could reasonably have anticipated the possibility of being called to defend an action in Pennsylvania.

In *Inpacco, Inc. v. McDonald's Corp.*, 413 F. Supp. 415 (E.D. of Pa. 1976), relying on *Procter-Schwartz*, the court held that the existence of a contract between the Pennsylvania plaintiff corporation and the non-resident defendant which prompted considerable correspondence and a series of business trips by defendant's representative into Pennsylvania provided sufficient minimum contacts to satisfy the requirements of due process and confer jurisdiction upon Pennsylvania courts. In so holding the court stated:

"Bearing in mind that 'the due process clause defines a rather low threshold of state interest sufficient to justify exercise of the state's sovereign decisional authority with respect to a given transaction,' *Aldens, Inc. v. Packel*, 524 F. 2d 38, 43 (3rd Cir. 1975), I have no difficulty in holding that subjecting defendant to in personam jurisdiction in Pennsylvania is fully consistent with due process requirements. The defendant's contacts with Pennsylvania in this case are, in fact, more

extensive than those of the defendant in *Procter* and other cases which have upheld the exercise of in personam jurisdiction over foreign corporations."

The court went on to cite two District Court cases, *Mackensworth v. American Trading Transportation Co.*, 367 F. Supp. 373 (E.D. of Pa. 1973) and *Aquarium Pharmaceuticals, Inc. v. Industrial Pressing and Packaging, Inc.*, 358 F. Supp. 441 (E.D. of Pa. 1973), as examples of the minimal nature of contacts required to sustain jurisdiction over non-resident corporate defendants. The former held that the single act of taking on a load of cargo at a Pennsylvania port was a sufficient contact to sustain the exercise of in personam jurisdiction over a non-resident shipping company; the latter found that the single shipment of defective goods into Pennsylvania was a sufficient contact for diversity jurisdiction.

In the instant case the plaintiffs contend that the three requirements of *Procter-Schwartz* have been met. The first requirement, that the defendants have "purposefully availed" themselves of the privilege of acting within the Commonwealth is met, plaintiffs contend, by the ongoing business relationship between Statewide Contractors, Inc. and Epic Metals, a Pennsylvania concern, in which Statewide acted as a distributor for certain products of Epic Metals in Florida. This relationship has been in existence since 1971 and has involved approximately five and a half million dollars worth of business. Additionally, plaintiffs contend that defendants have purposefully availed themselves of the privilege of acting within Pennsylvania by executing a franchise agreement with plaintiffs on August 28, 1972, of perpetual duration, which, by its terms is to be governed by Pennsylvania law. The defendants, in arguing that the first requirement of *Procter-Schwartz, supra*, has not been met, contend that although Statewide Contractors, Inc. conducted business in Pennsylvania between December

1972 and June 1974, by acting as a distributor for Epic Metals, this contact within the Commonwealth ceased prior to the breach of the alleged agreement in September of 1974.

In light of the holdings of *Procter-Schwartz, supra*, and *Inpacco, supra*, the court is of the opinion that the existence of the widespread business dealings of Statewide Contractors, Inc. with Epic Metals taken in conjunction with the existence of the August, 1972 agreement which was to be interpreted under Pennsylvania law, clearly indicates that the defendants have purposefully availed themselves of the privilege of acting within the Commonwealth of Pennsylvania thereby invoking the benefits and protection of its laws.

As to the second requirement of *Procter-Schwartz*, that the cause of action arise from the defendant's activities within the Commonwealth, the court is confronted with a fundamental factual dispute. The plaintiffs contend that the alleged agreement to retain Fowler-White to represent Statewide Contractors, Inc. and Epic Metals in the Florida anti-trust action was consummated at a meeting held on December 5, 1972 at the Greater Pittsburgh International Airport, Pittsburgh, Pennsylvania. The defendants concede that there was a meeting held at the Greater Pittsburgh International Airport on that date, but steadfastly maintain that the ultimate agreement to retain Fowler-White was consummated not at the Airport meeting in December, 1972 but rather at a prior meeting held in Florida at the offices of Fowler-White in November, 1972. After a careful review of the depositions of those in attendance at the December 5th meeting, the court is of the opinion that the weight of credible evidence favors the plaintiffs' position. The deposition of Mr. Ronald McCall, Esq., a member of the Fowler-White law firm at page 14 states:

Q When you came to Pittsburgh to interview the witness at the VIP Room at the Airport, do you

*Appendix A*

recall any discussions concerning attorneys' fees with Statewide and your law firm?

A Well, I recall a discussion of the fee arrangement, and I am not sure whether it was before or after we talked to Mr. Van Sicklin, but the meeting did take place in the Airport and we did discuss fee arrangement and we did reach an agreement as to the fee arrangement.

Q What was that?

A I was to write a memo about it and at some point afterwards in January I wrote the letter sending a copy to Mr. Donald Landis and also a copy to Mr. Jerry Landis.

The deposition of Mr. Jerry B. Landis, Esq., states at page 7-8:

Q Would you tell us where this alleged oral agreement took place?

A At a VIP Room at the Greater Pittsburgh Airport in Moon Township.

Q Can you tell us a specific day?

A Yes, I can. It was December 5, 1972.

Q Would you tell us who was present in the VIP Room when this agreement took place?

A Donald Landis, Nathan Kelly, Ronald McCall and me.

Q Why were all of you meeting in the VIP Room?

A To discuss the possibility, to discuss, make a final arrangement for counsel fees and for representation of the defendants and Epic Metals Corporation in a lawsuit that had been filed.

*Appendix A*

The deposition of Donald Landis, at page 10, states:

Q Do you recall what, if anything, Nathan Kelly said at that meeting about the fees, the attorneys' fees?

A He convinced me to go along on an hourly rate plus a lesser percent.

The defendants in support of their allegation of a prior agreement offered the deposition of Nathan H. Kelly which, at page 4, states:

Q Have you ever retained a law firm to represent you in an anti-trust action in the State of Florida?

A Yes, I did.

Q Can you state the name of the law firm that you retained?

A Fowler, White out of Tampa.

Q Do you recall the approximate date that you retained the law firm of Fowler, White?

A I think, it was sometime in November.

Q Of what year?

A Of 1972

The court is of the opinion that, based upon the above depositions, and solely for the purposes of determining the defendant's preliminary objections, the alleged agreement was reached retaining Fowler-White to represent the defendants on December 5, 1972 at the Greater Pittsburgh International Airport. Thus, the attorney-client relationship was created at that meeting. The cause of action, therefore, based on an alleged breach of this contractual relationship, arises out of the defendant's activities within the Commonwealth. The second requirement of *Procter-Schwartz* is thereby satisfied.

The final guideline of *Procter-Schwartz*, requires a determination as to whether the exercise of jurisdiction over the defendants under circumstances of the particular case is fair and reasonable.

In *Procter-Schwartz* the court held that it was fair and reasonable to require a non-resident defendant who conducted an "essentially localized operation" in Georgia to defend in Pennsylvania, finding that the defendant had conducted extensive and active negotiations within the Commonwealth. The court stated:

"To the extent the buyer vigorously negotiates, perhaps dictates, contract terms...and otherwise departs from the passive buyer role it would seem that any unfairness which would normally be associated with the exercise of long-arm jurisdiction over [it] disappears." Citing *In-Flight Devices Corp. v. Van Dusen Air, Inc.* P. 21

In the instant case, the record is clear that the defendants Statewide Contractors, Inc. and its President, Nathan H. Kelly, have conducted an ongoing business relationship in the Commonwealth of Pennsylvania and have actively negotiated and executed franchise agreements which by their terms are to be governed by Pennsylvania law. Additionally, the plaintiff, Jerry B. Landis, is a resident of Pennsylvania. The court is of the opinion that under the circumstances presented in the instant case the exercise of jurisdiction by Pennsylvania courts over the non-resident defendant is both fair and reasonable. It was entirely foreseeable that as a result of this ongoing business relationship between Statewide and Epic Metals that Statewide would be called to litigate any dispute arising from the franchise agreements in Pennsylvania. It is clear, in addition, that such agreements had significant economic ramifications within the Commonwealth of Pennsylvania.

Further, it cannot be disputed that this Commonwealth has an interest in resolving a suit brought by one of its residents.

Thus, the court is of the opinion, in light of the holdings in *Procter-Schwartz, supra*, and *Inpaco, supra* where the mere existence of a contract and active negotiations with a Pennsylvania resident were found sufficient to support a fair and reasonable exercise of jurisdiction in Pennsylvania, that the instant case presents an exercise of jurisdiction by the Pennsylvania courts over the corporate defendant that is both fair and reasonable and comports with the traditional notions of due process.

## II. THE INDIVIDUAL DEFENDANT.

In order to confer jurisdiction over a non-resident individual the court must find that the individual was "doing business" within the Commonwealth in such a manner as to create sufficient minimum contacts to render the exercise of jurisdiction fair and reasonable. Again, the court must be guided in its evaluation of the facts by "traditional notions of fair play and substantial justice."

The court's consideration of the instant case is limited solely to the question of jurisdiction. The court is without authority to pass, in a preliminary manner, upon the plaintiffs ultimate right to recover on all the contentions involved in their cause of action. *Holmes Petition*, 383 Pa. 99, 102 (1955).

In the instant case, based upon the limited record available, and solely for the purposes of determining the question of jurisdiction, the court is of the opinion that the corporate defendant and individual defendant are so intertwined that it is both fair and reasonable to jointly subject the defendants to the jurisdiction of the court. The record indicates that the individual defendant, along with the corporate defendant, was a party to the franchise

agreements with Epic Metals; that the individual defendant negotiated and executed these agreements on behalf of the corporate defendant; that the individual defendant executed a "Guaranty and Suretyship Agreement" dated November 21, 1973, whereby the individual defendant and his wife agreed to guarantee and become surety for obligations owed by Statewide to Epic Metals. The stated purpose of this Guaranty and Suretyship Agreement was to induce Epic to continue to transact business with Statewide. Additionally, the individual defendant, apparently without benefit of corporate resolution, chose Fowler-White as counsel for the anti-trust litigation and ultimately decided on the final fee arrangement.

Thus, while the limited record appears to support defendant, Nathan H. Kelly's, contention that he, individually, conducted no business in Pennsylvania which would subject him to the court's jurisdiction, his activities as President of Statewide were of such a personal nature, of such dominating proportions, and of such continuous duration that the court is of the opinion that it is both fair and reasonable to subject him, along with the corporate defendant, to the jurisdiction of the court. The plaintiffs must, of course, still prove these facts during the course of the trial to achieve relief. The question of whether the corporate veil has been pierced still is an open question. The court's conclusion today establishes only that, based on the record, there are sufficient minimum contacts between the individual defendant and the Commonwealth of Pennsylvania to afford plaintiffs the opportunity to prove these allegations in Pennsylvania.

### **III. IMPROPER SERVICE OF PROCESS, IMPROPER VENUE.**

The court having found that the exercise of jurisdiction over both the corporate and individual defendants is fair and

reasonable and comports with traditional notions of due process also finds that service of process and venue are, under the circumstances of this case, also proper.

### **IV. MORE SPECIFIC PLEADING.**

Finally, the defendants have moved the court for a more specific pleading with respect to Paragraph 6, 7, 8 and 9 of the plaintiffs' complaint. The central thrust of these Paragraphs is the allegation that the individual defendant, Nathan H. Kelly, has at all times pertinent hereto, used the corporate defendant, Statewide Contractors, Inc., as his alter ego to avoid the payment of obligations properly due. These are significant allegations given the posture of the case. The entire basis for the exercise of jurisdiction over the individual defendant, Nathan H. Kelly, revolves around this allegation of alter ego. While the court is convinced that the allegations and rudimentary evidence which can be gleaned from the record herein are sufficient to support the fair and reasonable exercise of jurisdiction, the court is of the opinion that such allegations fail to state material facts with sufficient particularity which would afford defendants a fair opportunity to prepare to defend against such allegations at trial. Defendants' motion for more specific pleadings as to Paragraphs 6, 7, 8 and 9 of plaintiffs' complaint is granted.

## Superior Court of Pennsylvania

SITTING AT PITTSBURGH

FOWLER, WHITE, GILLIAN, BOGGS,  
WILLAREAL & BANKER, P.A., a  
Professional Association, and  
JERRY B. LANDIS  
v.,  
STATEWIDE CONTRACTORS, INC.,  
and NATHAN H. KELLY,  
*Appellants*

No. 735  
April Term, 1977

### ORDER

AND NOW, this 15th day of February, 1978, it is ordered as follows:

- Order Affirmed.
- Order Reversed.
- Order Vacated and lower court directed to proceed in accordance with opinion filed herewith.
- Order Modified as set forth in Opinion filed herewith.
- Ordered as set forth in opinion filed herewith.
- Costs to be taxed as provided by Chapter 27 of the Pa. R. A. P.
- Costs to be taxed as provided in opinion filed herewith.

BY THE COURT

/s/ IRMA T. GARDNER

*Deputy Prothonotary*

NOTE: Unless another date is hereinafter set forth, the foregoing order was entered on the docket on the date set forth above. Order entered: \_\_\_\_\_.

## IN THE Superior Court of Pennsylvania

No. 1350/1977

FOWLER, WHITE, GILLEN, BOGGS,  
WILLAREAL & BANKER, P.A., a  
Professional Association, and  
JERRY B. LANDIS

No. 735  
April Term, 1977

vs.

STATEWIDE CONTRACTORS, INC.,  
and NATHAN H. KELLY,

*Appellants*

Appeal from the Order of the Court of Common Pleas,  
Civil Division, of Allegheny County, at No. G.D. 76-  
17456.

PER CURIAM:

Order affirmed.

Filed: Feb. 15, 1978

**Supreme Court of Pennsylvania**

WESTERN DISTRICT

SALLY MRVOS

*Prothonotary*

IRMA T. GARDNER

*Deputy Prothonotary*

801 CITY-COUNTY BUILDING

PITTSBURGH, PA.

15219

August 3, 1978

Richard G. Spagnolli, Esquire  
 McArdle, Caroselli, Spagnolli & Beachler  
 1100 Law & Finance Bldg.  
 Pittsburgh, Pa. 15219

In Re: Statewide Contractors, Inc., and Nathan H. Kelly,  
 Petitioner v. Fowler, White, Gillen, Boggs, Villareal  
 & Banker, etc., et al., Respondents  
 No. 1553 Allocatur Docket

Dear Mr. Spagnolli:

The Court has entered the following Order on your  
 Petition for Allowance of Appeal, in the above-entitled  
 matter:

**ORDER**

"8-3-78

Petition denied.

Per Curiam"

Very truly yours,

/s/ IRMA T. GARDNER  
*Deputy Prothonotary*

ITG:ban

cc: Frederick N. Egler, Esq.  
 Richard H. Albert, Esq.  
 Egler & Reinstadtler  
 2100 Lawyers Bldg.  
 Pittsburgh, Pa. 15219

**APPLICABLE STATUTORY PROVISIONS**

Pennsylvania "Long Arm Statute," Act of 1972, November 15, P.L. 1063, No. 271, §8301 *et seq.*, 42 Pa. C.S.A. §8301 *et seq.*

**§8302 Nonqualified foreign corporations**

(a) General rule.—Any foreign corporation which shall have done any business in this Commonwealth without procuring a certificate of authority to do so from the Department of State as required by statute, shall be conclusively presumed to have designated the Department of State as its true and lawful attorney authorized to accept, on its behalf, service of process in any action arising within this Commonwealth. Service of process shall be made in the manner provided by section 8307 of this title (relating to procedure for service of process).

(b) Issuing authority.—Such process may be issued by any court, magistrate or justice of the peace having jurisdiction of the subject matter of the controversy.

(c) Cumulative remedy.—Nothing contained in this section shall limit or affect the right to serve any process, notice or demand, required or permitted by law to be served upon a foreign corporation, in any other manner now or hereafter permitted by law.

**§8304 Doing business by individuals**

Any nonresident of this Commonwealth who, acting individually under or through a fictitious business name, or through an agent, servant or employee, shall have done any business in this Commonwealth on or after August 30, 1970, or a resident of this Commonwealth who shall have done business in this Commonwealth on or after August 30, 1970 and thereafter shall have become a nonresident of this Commonwealth or shall conceal his whereabouts, shall be conclusively presumed to have designated the Department of State as his agent for the receipt of service of process in

any civil action or proceeding instituted in the courts of this Commonwealth against such individual, if and only if at the time the cause of action accrued or the harm or financial loss occurred, the nonresident or the resident who shall thereafter have become a nonresident, shall have been doing business with this Commonwealth as heretofore provided.

#### **§8309 Acts affecting jurisdiction**

(a) General rule.—Any of the following shall constitute “doing business” for the purposes of this chapter:

- (1) The doing by any person in this Commonwealth of a series of similar acts for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object.
- (2) The doing of a single act in this Commonwealth for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object with the intention of initiating a series of such acts.
- (3) The shipping of merchandise directly or indirectly into or through this Commonwealth.
- (4) The engaging in any business or profession within this Commonwealth, whether or not such business requires license or approval by the Commonwealth or any of its agencies.
- (5) The ownership, use or possession of any real property situate within this Commonwealth.

(b) Exercise of full constitutional power over foreign corporations.—In addition to the provisions of subsection (a) of this section the jurisdiction and venue of courts of the Commonwealth shall extend to all foreign corporations and the powers exercised by them to the fullest extent allowed under the Constitution of the United States.

(c) Exception.—Notwithstanding any other provision of this section, for the purposes of determining jurisdiction of courts within this Commonwealth, inspecting, appraising and acquiring real estate and mortgages, and other liens thereon, and personal property and security interest therein and holding, leasing away, conveying and transferring the same, as fiduciary or otherwise, or collecting debts and enforcing mortgages and rights in property securing the same by any foreign corporation shall not constitute “doing business.”

In the  
Supreme Court of the United States

STATEWIDE CONTRACTORS, INC., and  
NATHAN H. KELLY,

*Petitioners,*

vs.

FOWLER, WHITE, GILLEN, BOGGS,  
VILLAREAL & BANKER, P.A., a  
Professional Association, and  
JERRY B. LANDIS,

*Respondents.*



**PROOF OF SERVICE**

I hereby certify that I am on this day serving the foregoing documents upon the persons named below by mailing the same by first class mail:

Richard H. Albert, Esquire  
Egler & Reinstadtler  
2100 Lawyers Building  
Pittsburgh, Pennsylvania 15219

Irma T. Gardner, Deputy Prothonotary  
Supreme Court of Pennsylvania  
801 City-County Building  
Pittsburgh, Pennsylvania 15219

Dated: August 30, 1978

McARDLE, CAROSELLI, SPAGNOLLI  
& BEACHLER

By .... /s/ RICHARD G. SPAGNOLLI .....

Richard G. Spagnolli  
*Attorney for Petitioner*

Supreme Court of the  
United States

F I L E D

OCT 18 1978

MICHAEL KOLAK, JR., CLERK

In the  
Supreme Court of the United States

No. 78-456

STATEWIDE CONTRACTORS, INC.,  
and NATHAN H. KELLY,

*Petitioners,*

vs.

FOWLER, WHITE, GILLEN, BOGGS, VILLAREAL &  
BANKER, P. A. PROFESSIONAL ASSOCIATION,  
and JERRY B. LANDIS,

*Respondents.*

BRIEF OF RESPONDENTS  
IN OPPOSITION TO PETITION FOR WRIT OF  
CERTIORARI

FREDERICK N. EGLER, ESQUIRE  
 EGLER & REINSTADTLER  
 2100 Lawyers Building  
 Pittsburgh, Pennsylvania 15219  
(412) 281-9810

*Attorneys for Respondents*

## INDEX TO BRIEF

	<u>Page</u>
SUPREME COURT RULE INVOLVED.....	1
QUESTION PRESENTED FOR REVIEW .....	1
COUNTER-STATEMENT OF THE CASE .....	1-2
REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI AND IMPOSING DAMAGES ON PETITIONERS FOR DELAY CAUSED BY FILING GROUNLESS PETITION	2-4
CONCLUSION.....	5
PROOF OF SERVICE .....	6

**SUPREME COURT RULE INVOLVED**

Supreme Court Rule 56(4) states:

"Where a petition for a writ of certiorari has been filed, and there appears to be no ground for granting such a writ, the court may, in appropriate cases, adjudge to the respondent reasonable damages for his delay."

**QUESTION PRESENTED FOR REVIEW**

WHETHER THE SUPREME COURT SHOULD ADJUDGE PETITIONERS RESPONSIBLE FOR DAMAGES FOR THE DELAY CAUSED BY FILING THIS GROUNLESS PETITION FOR WRIT OF CERTIORARI, WHERE THE OPINION OF THE TRIAL COURT, AFFIRMED PER CURIAM BY TWO STATE APPELLATE COURTS, HELD THERE WERE SUFFICIENT MINIMUM CONTACTS BETWEEN PETITIONERS AND THE COMMONWEALTH OF PENNSYLVANIA, MAKING THE EXERCISE OF IN PERSONAM JURISDICTION ON PETITIONERS CONSISTENT WITH TRADITIONAL NOTIONS OF FAIR PLAY AND SUBSTANTIAL JUSTICE, AND WHERE THE PETITION FOR WRIT OF CERTIORARI WAS FILED SOLELY FOR DELAY.

**COUNTER-STATEMENT OF THE CASE**

This Counter-Statement of the Case is made to correct inaccuracies or omissions in the Statement of the Case made by the Petitioners.

The agreement for legal services made by all parties was entered into on September 5, 1972, at the Greater Pittsburgh International Airport in Allegheny County, Pennsylvania. As stated in the Trial Court's Opinion, both Ronald D. McCall, Esquire, from Fowler, White, and Jerry B. Landis,

Esquire, gave deposition testimony supporting the date, time and place of entering into this agreement in Allegheny County, Pennsylvania.

**REASONS FOR DENYING THE WRIT OF  
CERTIORARI AND IMPOSING DAMAGES ON  
PETITIONERS FOR DELAY CAUSED BY FILING  
THIS GROUNLESS PETITION**

**THERE IS ABSOLUTELY NO BASIS FOR THIS  
PETITION FOR WRIT OF CERTIORARI SINCE  
THE RECORD AND TRIAL COURT OPINION  
FULLY SUPPORT THE EXERCISE OF IN PER-  
SONAM JURISDICTION ON THE PETI-  
TERS.**

**FURTHER, BECAUSE THIS PETITION DOES  
NOT SET FORTH GROUNDS FOR GRANTING  
THE WRIT, THE SUPREME COURT SHOULD  
ADJUDGE PETITIONERS RESPONSIBLE FOR  
DAMAGES AND DELAY WHICH THIS PETI-  
TION HAS CAUSED.**

**THE SUPREME COURT SHOULD ADJUDGE  
PETITIONERS RESPONSIBLE FOR DAMAGES  
PURSUANT TO THIS COURT'S RULE 56(4) TO  
DETER OTHER GROUNLESS PETITIONS FOR  
WRIT OF CERTIORARI.**

The Trial Court Opinion makes it crystal clear that there is in personam jurisdiction on STATEWIDE and KELLY in the Court of Common Pleas of Allegheny County, Pennsylvania. There is simply no ground to support the Petition for Writ of Certiorari.

Rule 56 of the Supreme Court provides for this Honorable Court to award damages for delay caused by the filing of this Petition.

This case affords this Honorable Court an excellent opportunity to provide relief to the Respondents and to again remind future litigants that Petitions for Writ of Certiorari filed for delay purposes are subject to damage awards for the respondents.

In this case, the Record shows the Complaint was filed on August 9, 1976.

The Trial Court wrote a thorough opinion applying the applicable statutes and case law. The Trial Court's Opinion and Order were filed on April 21, 1977.

Notwithstanding this Opinion from the Trial Court, Petitioners filed an appeal in the Superior Court of Pennsylvania. The Superior Court affirmed the Opinion and Order of the Trial Court on February 15, 1978. Consequently, Petitioners accomplished an additional delay of approximately ten months as a result of the Appeal to the Superior Court.

Petitioners were not content to terminate the already protracted delay. Petitioners then filed a Petition for Allowance of Appeal in Supreme Court of Pennsylvania. On August 3, 1978, the Supreme Court of Pennsylvania denied this Petition. At this point, the Petitioners had accomplished a delay of nearly two years since Respondents filed their Complaint.

It is now October, 1978, and the delay in this case goes on as a result of this Petition for Writ of Certiorari.

It is evident that the only conceivable cause for this Petition comes in the delay that Petitioners anticipate and achieve in the appeal process.

It is well known that the Supreme Court of the United States receives hundreds of petitions for writ of certiorari each year. With this Honorable Court being the final guide and interpreter on many important issues, it is imperative

that this Court be free to address itself to the appropriate cases. Groundless petitions for writ of certiorari only delay respondents from their entitled relief and deplete this Honorable Court's resources.

This case is an excellent opportunity for this Honorable Court to deter groundless petitions. Imposing damages on Petitioners here for this more than two year delay would serve clear notice to the legal community that the Supreme Court will not provide impunity to those who file these groundless petitions.

**CONCLUSION**

It is respectfully requested that this Petition for Writ of Certiorari be denied.

It is further respectfully submitted that appropriate damages be adjudged to Respondents, including reasonable attorneys' fees incurred by Respondents, in the three appeals filed by Petitioners, to be determined by the Trial Court, and a ten percent (10%) per annum interest on any final judgment entered on behalf of Respondents.

Respectfully Submitted,

FREDERICK N. EGLER, ESQUIRE

EGLER & REINSTADTLER

2100 Lawyers Buildings

Pittsburgh, Pennsylvania 15219

(412) 281-9810

*Attorneys for Respondents*

**PROOF OF SERVICE**

I hereby certify that I am on this day serving the foregoing Brief in Opposition to the Petition for Writ of Certiorari to the persons named below by first class mail:

Richard G. Spagnolli, Esquire  
and Stephen P. Laffey, Esquire  
1100 Law & Finance Building  
429 Fourth Avenue  
Pittsburgh, Pennsylvania 15219

Irma T. Gardner, Deputy Prothonotary  
Supreme Court of Pennsylvania  
801 City-County Building  
Pittsburgh, Pennsylvania 15219

Dated: October 16, 1978

EGLER & REINSTADTLER

BY: /s/ FREDERICK N. EGLER

Frederick N. Egler, Esquire  
*Attorney for Respondents*